

DISTRICT OF COLUMBIA

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ALCOHOLIC BEVERAGE CONTROL BOARD

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MEETING

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IN THE MATTER OF: :

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Basque Bar, LLC :

300 Florida Ave NW : Fact Finding

License No. 98528 : Hearing

Retailer CT :

ANC 5E :

:

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APRIL 29, 2015

The Alcoholic Beverage Control Board
 met in the Alcoholic Beverage Control Hearing
 Room, Reeves Building, 2000 14th Street N.W.,
 Washington, D.C., Chairperson Ruthanne Miller,
 presiding.

PRESENT:

RUTHANNE MILLER, Chairperson

DONALD BROOKS, Member

NICK ALBERTI, Member

HECTOR RODRIGUEZ, Member

MIKE SILVERSTEIN, Member

JAMES SHORT, Member

HERMAN JONES, Member

1 P-R-O-C-E-E-D-I-N-G-S

2 1:50 p.m.

3 CHAIRPERSON MILLER: Okay, we're back
4 on the record for another fact finding case.

5 It's Basque Bar, LLC, trading as To Be
6 Determined, at 300 Florida Avenue, Northwest,
7 License No. 98528 in ANC 5B. Good afternoon.

8 MR. KLINE: Good afternoon. Andrew
9 Kline here on behalf of the applicant.

10 MR. FITZ: Sam Fitz.

11 MR. KLINE: Principle of the
12 applicant.

13 CHAIRPERSON MILLER: What is your name
14 again?

15 MR. FITZ: Sam Fitz.

16 CHAIRPERSON MILLER: Sam Fitz, okay.

17 MR. KLINE: F-I-T-Z.

18 CHAIRPERSON MILLER: Okay, great.
19 Okay, and we also -- we do have a copy of your
20 letter, Mr. Kline.

21 MR. KLINE: Good.

22 CHAIRPERSON MILLER: Addressing some

1 of the issues that -- but I think I'm going to
2 just have you start with explaining the situation
3 and the questions, with respect to what you can
4 and cannot -- what he can and cannot sell, with
5 respect to the wine bar permit.

6 MR. KLINE: Okay, as the Board is
7 aware, this is an application for a CT license,
8 also seeking a wine pub permit, and I think that
9 the issue that brings us before the Board today
10 is the provision in D of the wine pub permit,
11 which says --

12 CHAIRPERSON MILLER: Excuse me.

13 MEMBER ALBERTI: I'm sorry.

14 MR. KLINE: And I quote, "The holder
15 of a wine pub permit may also sell wine to
16 patrons in sealed bottles or other closed
17 containers for off-premises consumption."

18 Now, in reading this, and then looking
19 at it for the very first time, when it was first
20 passed, it seems pretty clear to us that there
21 isn't any restriction that -- in terms of what
22 you sell for off-premises consumption.

1 It's been suggested to me offline by
2 the Agency, that perhaps, it was intended that
3 this provision only allows the sale of product
4 that's manufactured on the premises.

5 However, the plain language of the
6 statute is written doesn't say that, and from a
7 statutory construction standpoint, the Board is
8 of course, charged with construing the statute
9 and making the first determination as to what the
10 statute means, but in doing so, the Board is
11 constrained by plain language, and it would
12 appear, at least to me and to other lawyers that
13 I've had look at this and other people that I've
14 had look at it, just to kind of get a read, is
15 that the plain language says that you can sell
16 wine to patrons in sealed bottles or other closed
17 containers, and does not limit it to product
18 that's manufactured on the premises.

19 Now, we have another similar
20 provision, and we've discussed all this in the
21 letter. The similar provision is the one for
22 brew pubs, and the language for brew pubs is

1 very, very different.

2 The language for brew pubs explicitly
3 talks about sale of beer in growlers and growlers
4 are specifically defined as reusable containers,
5 that are filled on the premises.

6 So, in the growler situation, it's
7 clear that we are, based on the plain language,
8 that what was intended is that the breweries are
9 restricted to selling beer manufactured on the
10 premises.

11 Contrast that with the language in the
12 brew pub section, which doesn't have any
13 restriction, doesn't say we're talking about
14 reusable containers or containers filled on the
15 premises, I mean, it just says that you can sell.

16 Now, a second principle -- if the
17 Board decides -- in the first instance, we
18 believe it's clear on its face. If it's clear on
19 its face, the Board goes no further and says it's
20 clear on its face, that's what I means, and we
21 think it is.

22 If there is any -- if the Board

1 disagrees with that, and says, "Well, we think
2 it's subject to analysis, based upon the rest of
3 the wording of the statute," or what have you,
4 then if you look at the growler provision and you
5 contrast the language, you see there is a
6 difference, and there is case law, which we've
7 cited in the letter, which says when then
8 legislature uses certain language in one part of
9 the statute, and different language in another,
10 it must be assumed that different meanings were
11 intended, and in this case, we would submit that
12 the different meanings is in the case of brew
13 pubs, that beer may only be sold for consumption
14 off premises, that's manufactured on the premises
15 because it has to be filled on the premises, in
16 these reusable containers, where the different
17 language of the brew pub statute has no
18 restriction and indicates that any wine may -- in
19 sealed bottles or other closed containers, may be
20 sold for off-premises consumption.

21 Now, I understand the Board perhaps,
22 has some policy concerns about, well, wait a

1 minute, what are we doing here? Are we creating
2 a backdoor, another off-premises licenses and
3 some sort of backdoor fashion?

4 From a practical standpoint, we don't
5 believe that to be the case, and let me tell you
6 why.

7 First is in terms of the expenses of
8 creating the manufacturing facility, my client
9 can tell you, they're going to spend about
10 \$50,000 in terms of -- and this is -- to clarify
11 for the record, this is actually cider. What's
12 intended here is to manufacturer cider, but under
13 the statute, cider is classified as wine.

14 So, we're going to talk about wine.
15 In our application, we really mean cider, but
16 under the law, it's all wine. So, that's what
17 we're talking about.

18 So, they're going to spend about
19 \$50,000 to create the manufacturing component,
20 then -- and this is probably even bigger expense,
21 is the amount of space that is required for the
22 fermentation tank, about 20 percent of their

1 space is going to be devoted to this tank and the
2 manufacturing processes.

3 So, you have significant expense
4 involved, that would deter anyone who frivolously
5 decided, "Oh, ghee, what a neat way to open up an
6 off-premise store. We'll just go in and call
7 ourselves a wine pub, and pretend like we're
8 going to manufacture," and this and that. It
9 doesn't seem very likely.

10 Thirdly, in order to do this, one must
11 get approval from TTB, the Federal Agency, in
12 terms of the processes, the labeling, something
13 else, processes, labeling, formulas. All must go
14 through a review by TTB, which is time consuming,
15 expensive and rigorous.

16 Fourthly, we have a \$5,000 license
17 cost, which is of course, much greater than one
18 would pay for an off-premise store, and that's on
19 top of the regular, in this case tavern license
20 fee.

21 So, the license fees are higher.
22 Those four components, we don't think there is

1 any real risk that if the Board said, "Yes, we
2 agree," that there's going to be a flood of
3 applicants in here attempting to use this wine
4 pub statutes, to backdoor an off-premise store.

5 There is just too much involved. We
6 represent a lot of these businesses. There are B
7 licenses out there, A licenses out there for off-
8 premise stores. So, I don't really see that as a
9 real concern. Perhaps, the Board feels
10 otherwise, but I thought it was important to
11 address that, in case the Board was concerned
12 about that issue.

13 But as I said, we think the -- we
14 think the language is clear on its face.

15 So, that's what I have at this point.
16 We're happy to answer any questions that the
17 Board might have about this particular operation
18 or any questions that you may have about how we
19 interpret the statute, which we don't think
20 there's really a need for interpretation, because
21 it seems to be clear on its face.

22 CHAIRPERSON MILLER: Okay, thank you.

1 Other Board questions?

2 (No audible response)

3 All right, I'll ask you some.

4 MR. KLINE: It's after lunch.

5 CHAIRPERSON MILLER: Okay, so, when I
6 look at the language they don't -- it doesn't
7 necessarily look all that different to me. When
8 I look at the wine pub language, it says you can
9 sell it, sell wine to patrons in sealed bottles
10 or other closed containers for off-premises
11 consumption.

12 That sounds similar to the -- to a
13 growler, which is -- I mean, it says it's a
14 reusable container or whatever, but it's sealed
15 on the premises for consumption off-premises.

16 So, they don't look that dramatically
17 different to me, even though the language is
18 somewhat different.

19 MR. KLINE: Well, let me tell you how
20 they are different.

21 CHAIRPERSON MILLER: They're sealed,
22 okay.

1 MR. KLINE: In the way the growler
2 language is set up, it says that one that holds a
3 brew pub license, the brew pub permit shall
4 authorize the license to sell beer in growlers.
5 So, that is the operative language.

6 CHAIRPERSON MILLER: Okay.

7 MR. KLINE: But then you look at the
8 definition of growler, and it says it means a
9 reusable container designed to be filled and
10 sealed on premises.

11 So, it's very, very clear that the
12 only thing that you're selling is something
13 that's filled on the premises. There is no such
14 restriction -- restricting language with respect
15 to the wine pub license. It simply says, "In
16 sealed bottles or other closed containers for
17 off-premises consumption."

18 CHAIRPERSON MILLER: Okay.

19 MR. KLINE: So, that is the
20 difference.

21 CHAIRPERSON MILLER: Not sealed on the
22 premises?

1 MR. KLINE: Right.

2 CHAIRPERSON MILLER: Okay.

3 MR. KLINE: It doesn't -- there is no
4 -- there is no restriction that that be the case,
5 and that certainly is clearly the case with
6 respect to a growler, which is for beer.

7 CHAIRPERSON MILLER: Okay, so, what do
8 you know about the legislative history or
9 anything, as to why they would be treated
10 differently?

11 MR. KLINE: Why they would be treated
12 differently?

13 CHAIRPERSON MILLER: Yes, the beer
14 pubs and the wine pubs.

15 MR. KLINE: I will tell you that yes,
16 and we looked at the legislative history, because
17 we were hopeful that there would be something
18 there that would further our argument, and there
19 is nothing there either way.

20 The section by section analysis is
21 simply a recitation of what you see in the
22 statute.

1 CHAIRPERSON MILLER: Okay.

2 MR. KLINE: It really doesn't shed any
3 light.

4 However, having said that, the Board,
5 I believe, under the law, is considered -- I'm
6 sorry, is constrained to interpret the statute,
7 to the extent that it's ambiguous, and again, we
8 don't think it's ambiguous.

9 CHAIRPERSON MILLER: Okay.

10 MR. KLINE: But if it is, then it must
11 be presumed, according to the case law, that
12 where the legislature used different language to
13 treat a similar subject, that they intended
14 something different.

15 So, I don't know, you know, we're
16 going to sit here and say is the D.C. Council
17 that smart or not that smart. That really
18 doesn't matter, because under the rule of
19 statutory construction, we're suppose to presume
20 that when they use, and talk about a similar
21 subject, then they meant something different.

22 CHAIRPERSON MILLER: Okay, how about

1 in other states? Do you know if they treat this
2 situation differently?

3 MR. KLINE: Well, I can't say that I
4 catalog every other state, but the --

5 CHAIRPERSON MILLER: Any other state?

6 MR. KLINE: -- difficulty is the
7 states that I am familiar with, they are pretty
8 liberal on-and-off licenses, so it's not really
9 an issue.

10 I mean, in Virginia, on-and-off
11 licenses are allowed and prevalent and so, we
12 don't have that issue, and the same in Maryland.
13 I mean, there are on-and-off licenses everywhere,
14 and on-and-off, I use the term and some of you
15 may or may not be familiar with it. It just
16 means -- on-and-off means for consumption on
17 premises and selling beverages for consumption
18 off premises and we don't know the term that much
19 here, because we don't have on and off licenses.

20 CHAIRPERSON MILLER: But you don't
21 mean just selling off --

22 MR. KLINE: Except for grocery stores

1 and --

2 CHAIRPERSON MILLER: You don't mean
3 just selling off premises. We're talking about
4 other companies wines, right? We're not just
5 talking about -- or are we?

6 MR. KLINE: Right, but you asked me --

7 CHAIRPERSON MILLER: Okay.

8 MR. KLINE: You asked me -- I mean,
9 this -- our context is a little different because
10 we do have these restrictions against holding two
11 classes of licenses.

12 CHAIRPERSON MILLER: Right, okay.

13 MR. KLINE: So, we have a different
14 backdrop.

15 CHAIRPERSON MILLER: Okay.

16 MR. KLINE: Whereas, Virginia and
17 Maryland, which are the two states that I am
18 primarily familiar with --

19 CHAIRPERSON MILLER: Yes.

20 MR. KLINE: -- other than the
21 District, don't have these restrictions on on-
22 and-off, so, you don't have the backdrop where it

1 would even be an issue.

2 The only reason it becomes an issue
3 here is because we have had traditionally, on-
4 premise licenses, off-premises licenses, and the
5 two didn't meet up until the farm wine tasting
6 room statute was passed, which I don't think
7 everything is, and then after that, the grocery
8 store on-and-off, and since then, we've had some
9 other chipping away around the edges.

10 We think that, you know, as I said,
11 the language is clear. It says what it says,
12 and we think it could be error to construe the
13 plain meaning, or the plain language of the
14 statute any other way.

15 CHAIRPERSON MILLER: Okay, and then
16 when you said you checked the legislative
17 history, so, I assume there is nothing there that
18 goes to like the policy behind each of these
19 types of establishments that would --

20 MR. KLINE: Unfortunately not, I mean,
21 we'd be happy to share it with the Board's
22 Counsel, I mean, we've -- I've reviewed it. I've

1 looked it, because certainly, it's an issue to
2 the extent, but I'm going to remind the Board,
3 it's only an issue to the extent that the
4 language is ambiguous.

5 CHAIRPERSON MILLER: Right.

6 MR. KLINE: The language is clear on
7 its face, and it's the Board's duty to construe
8 it, consistent with what it says in plain
9 English, and we think in plain English, it says
10 that you can sell -- you can also sell wine for
11 consumption off the premises, and we also think
12 the use of the word 'also' sends a clue, which is
13 again, different than the brew pub statute, that
14 it's broader than just selling what is
15 manufactured.

16 No restrictions in the statute at all,
17 that says you're limited to selling for off-
18 premises consumption, that which is manufactured
19 on the premises.

20 CHAIRPERSON MILLER: Okay.

21 MR. KLINE: Now, I'm happy to take
22 questions, but I don't want to lose this.

1 It's also -- this is not frivolous,
2 this is also part of your business plan, which is
3 why when we were contacted by the Agency and
4 asked, "But will you just agree, you won't sell
5 these other products?" No, we're not going to
6 agree to that. We think it says something
7 different and we want to -- you know, we want to
8 be heard on this issue.

9 MR. FITZ: Can I chime in real quick?

10 MR. KLINE: Sure.

11 CHAIRPERSON MILLER: Yes, please.

12 MR. FITZ: At a brew pub, beer turns
13 over in a month. So, you have people coming to
14 your brew pub to buy your product, which you can
15 create a lot of.

16 Cider and wine takes six to 12 months.
17 So, in a 3,000 square foot facility, we'll have
18 our cider available maybe one out of every ten
19 days. So, we're going to have people coming for
20 what we're making, but we're not going to be able
21 to provide that quantity. It's not financially
22 viable.

1 So, my interest in selling other cider
2 to go is to put something in the hands of people
3 that are coming to see us, so that our project
4 would be financially viable.

5 CHAIRPERSON MILLER: Okay, I guess I
6 have one more question and then I'll -- that was
7 going to be one of my issues, about economically
8 viable.

9 I don't know how many wine pubs there
10 are now in the District, whether there are --
11 they are succeeding economically or they're not.
12 Do they need this kind of -- is your -- your
13 business unique in a certain way? Okay.

14 MR. FITZ: Absolutely.

15 CHAIRPERSON MILLER: Why is your
16 business unique, then say from other wine pubs?

17 MR. FITZ: Well, there aren't any wine
18 pubs at the moment, but more specifically, we're
19 trying to produce cider.

20 CHAIRPERSON MILLER: Okay.

21 MR. FITZ: My interest is producing
22 cider. My product is six percent alcohol

1 compared to 14 or 15 percent. So, I'm paying the
2 same national and local taxes and fees and
3 everything for a product that really doesn't have
4 a home. So, we're just calling it wine.

5 But in order to make this product
6 that's different than what anybody else is doing,
7 I can't afford to do it in the current landscape.

8 CHAIRPERSON MILLER: Okay.

9 MR. FITZ: Unless we were able to do
10 this.

11 CHAIRPERSON MILLER: Okay, thank you.
12 Go ahead, Mr. Rodriguez.

13 MEMBER RODRIGUEZ: So, on your menu,
14 do you advertise it as wine or cider?

15 MR. FITZ: Cider.

16 MEMBER RODRIGUEZ: Cider?

17 MR. FITZ: Yes.

18 MEMBER RODRIGUEZ: Okay.

19 MR. FITZ: Cider is technically apple
20 wine. So, it wouldn't be disingenuous to call it
21 wine.

22 MEMBER RODRIGUEZ: Yes.

1 MR. FITZ: But we will say cider.

2 MEMBER RODRIGUEZ: I'm learning. I'm
3 learning, okay.

4 MR. KLINE: I think we all are.

5 MR. FITZ: It's a product that's very
6 traditional in this region. Until prohibition,
7 apples grew everywhere and this was something
8 that was all through D.C. So, we're hoping to
9 bring it back.

10 MEMBER SHORT: Is that what they used
11 to call apple jack?

12 MR. FITZ: What's that?

13 MEMBER SHORT: That's what they used
14 to call apple jack?

15 MR. FITZ: I believe that apple jack
16 is a stronger product, and I don't think I'd be
17 allowed to make it because it's above 15 percent.
18 So, when you increase the alcohol to make a
19 spirit, which is also a very strong American
20 tradition, but it would exceed 15 percent and
21 we're not permitted in any way, to deal with
22 anything from fruit, above 15 percent.

1 MEMBER RODRIGUEZ: Your generation,
2 Mr. Short, apple jack.

3 MR. FITZ: We would be able to serve
4 it on premise, I would think, within a normal CT
5 license, but we absolutely would not be able to
6 sell it to go.

7 MR. KLINE: Or manufacture it.

8 CHAIRPERSON MILLER: Okay, Mr.
9 Alberti?

10 MEMBER ALBERTI: Yes, so, I just want
11 to pick up on your comment that you can -- you
12 know, you'll have product to sell every 10 days,
13 but in between, you'll have other manufacturer's
14 product to sell on site, right?

15 MR. KLINE: On premise, correct.

16 MEMBER ALBERTI: Right, right, well,
17 on premise.

18 MR. KLINE: On premise, yes.

19 MEMBER ALBERTI: On premise?

20 MR. KLINE: Yes.

21 MEMBER ALBERTI: So, for me, the issue
22 really is very simply whether or not this license

1 would allow us to sell -- someone to sell a
2 product that they don't manufacture for off-
3 premise consumption.

4 So, I'm not understanding, I don't
5 really see the contrast you made with the brew
6 pubs, because the question is still -- that's
7 still the question for brew pubs in that
8 legislation, and how we interpret it.

9 That brew pub legislation is vague
10 too, whether or not you can sell someone else's
11 product for off-premise consumption, because in
12 theory, a brew pub can have kegs of beer from a
13 variety of manufacturers. They don't have to be
14 the ones that they brew. They can bring in kegs
15 from any manufacture and they could fill them
16 with -- they could fill the growlers with other
17 manufacturers beer.

18 So, to me, the contrast -- to me, it's
19 the same issue.

20 MR. KLINE: Well --

21 MEMBER ALBERTI: The issue boils down
22 to, can these licenses, both the brew pub and the

1 wine pub, can they sell someone else's product
2 for off-premise consumption?

3 MR. KLINE: Okay.

4 MEMBER ALBERTI: That's really the
5 question.

6 MR. KLINE: Okay, I see your ambiguity
7 with the brew pubs, now that you raised it, and I
8 hadn't focused on it before. I think you're
9 right. I see your ambiguity with the brew pub.

10 But I don't see the same ambiguity
11 with the wine pub, because of the language.

12 MEMBER ALBERTI: Okay.

13 MR. KLINE: Because the language
14 again, for the wine pub says, "May also sell wine
15 to patrons in sealed bottles or other closed
16 containers, for off-premise consumption."

17 Nothing at all in that language,
18 unlike the growler language, that suggests in any
19 way, it's limited to that what's manufactured on
20 the premises. I mean, there is just nothing
21 there at all.

22 Whereas in the growler language, I

1 agree with you, it's probably not clear, but it's
2 at least ambiguous. In this case, we don't think
3 it's even ambiguous at all, because it doesn't
4 say. There isn't any hint that we're talking
5 about only what you manufacture.

6 Just because the permit gives you the
7 authority to manufacture, this sentence relating
8 to sale for off-premise consumption, has no
9 limiting language.

10 MEMBER ALBERTI: Thank you.

11 MR. KLINE: It has to be clear.

12 CHAIRPERSON MILLER: Any other
13 questions? Okay, anything else you want to add?

14 MR. KLINE: No, I think only that we
15 hope to the extent that this issue is -- the
16 Board thinks that this issue is clear, as I said,
17 that we'll be given some guidance.

18 CHAIRPERSON MILLER: Okay, you'll be
19 given some guidance and what?

20 MR. KLINE: In other words --

21 CHAIRPERSON MILLER: You don't think
22 it's clear, like the way you're reading it?

1 MR. KLINE: Right, if the Board
2 disagrees --

3 CHAIRPERSON MILLER: Okay, yes,
4 absolutely.

5 MR. KLINE: -- with our position, that
6 it's clear on its face, we certainly would like
7 to know that sooner, rather than later.

8 CHAIRPERSON MILLER: Okay, I think we
9 would probably put it in a written order.

10 Okay, but so, thank you very much.
11 That was very helpful.

12 MR. FITZ: Thank you.

13 CHAIRPERSON MILLER: I'll get back to
14 you soon.

15 MR. KLINE: Okay, thank you.

16 (Whereupon, the above-entitled matter
17 went off the record at 2:11 p.m.)
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